Supreme Court, U. S.
FILED
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APPENDIX
VOLUME I

* * *

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1979
NO. 78-1588

* * *

CAROL VANCE, ET AL.,
Appellants

V.

UNIVERSAL AMUSEMENT COMPANY, INC., ET AL.,
Appellees

* * *

Appeal From The United States Court of Appeals For The Fifth Circuit

* * *

NOTICE OF APPEAL FILED JANUARY 15, 1979

* * *

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1979

NO. 78-1588

* * *

CAROL VANCE, ET AL.,

Appellants

VS.

UNIVERSAL AMUSEMENT COMPANY, INC., ET AL.,

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Appeal From The United States Court of Appeals For The Fifth Circuit

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NOTATION

The following items appear in appendicies to the Jurisdictional Statement at the pages noted and are not reproduced in this Appendix:

OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT, FILED September 28, 1977 ..... Appendix I

OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT, REHEARING EN BANC FILED DECEMBER 18, 1978 ..... Appendix II

ORDER IN THE CASE OF STATE V. STAMBAUGH ..... Appendix III

DATE	PROCEEDINGS	Date of Judgment
11/12/73	Plaintiff's ORIGINAL COMPLAINT, filed. (w/request for 3 judge crt) (WS) This case is transferred to the docket of Judge Singleton's docket.	
4/26/73	Issued summons on all defts.	
5/1/73	Return of Summons on the following, served 5-1-73, filed: Troy R. Driskell Captain James M. Albright Herman Short Judge I.D. McMaster	
5/2/73	(JVS) HEARING ON APPLICATION FOR TRO: Appearances: Clyde Woody and Marion Rosen for plaintiffs. Joe Rollins and Joe Moss for defendants. Testimony of witnesses and argument of counsel. Court's ruling: Temporary restraining order DENIED.	
5/7/73	Return of Summons on Carol Vance, served 5-2-73, filed.	
9/73	( ) ORDER, filed, setting up three judge court consisting of John V. Singleton, Jr., Carl Bue and Joe Ingraham.	
5/21/73	DEFENDANT'S MOTION TO DISMISS, OR, IN THE ALTERNATIVE, MOTION FOR JUDGMENT ON THE PLEADINGS, PURSUANT TO RULE 12, FRCP, OR, IN THE FURTHER ALTERNATIVE, DEFEN-	

DANTS' ANSWER, filed. MD: 6-4-78 W/JURY DEMAND

5/22/73 RESPONSE OF THE STATE OF TEXAS, filed.

5/23/73 MOTION OF DEFENDANTS CAROL VANCE AND I.D. McMASTER TO DISMISS, OR IN THE ALTERNATIVE, MOTION FOR JUDGMENT ON THE PLEADINGS, PURSUANT TO RULE 12, FRCP, OR IN THE FURTHER ALTERNATIVE, DEFENDANTS' ANSWER, filed. M/D 6-18-73

5/25/73 (JVS) All preliminary motions deemed necessary, together supporting briefs will be filed on or before July 13, 1973. Such motions will include motions to dismiss, motions for judgment based upon any alleged unconstitutional aspects of the statutes involved and the procedures followed by the law enforcement agencies, including the seizure of the film, and any and all other motions counsel deem necessary. An oral hearing on all these motions will be held on Monday, July 30, 1973 at 9:30 A.M. This hearing will not include any matters relating to a factual determination of the alleged obscenity of the film but will be limited to the motions filed and any other procedural matters. If a further hearing to develop the facts on alleged obscenity is necessary a

date will be set at that time for such a hearing. Parties ntfd. by letter from the court.

6/26/73 ORDER Superseding part order of May 8, 1973 constituting a 3-Judge Court in this case, consisting of Judge Joe Ingraham, U.S. Circuit Judge; Judge John V. Singleton, Jr., U.S. District Judge for the Southern District of Texas; Judge W.M. Taylor, Jr., U.S. District Judge for the Northern District of Texas, signed on the 25th day of June, 1973, filed and entered. Parties ntfd. dw.

7/16/73 Pltf. MOTION FOR JUDGMENT, filed.

7/16/73 MEMORANDUM BRIEF of Deft. Short, Albright & Driskell, filed.

7/23/73 Floyd Travis Martin MOTION TO APPEAR AMICUS CURIAE, filed.

7/23/73 Pltf. Jones BRIEF, filed.

7/24/73 Deft. Dyson (City of Dallas) MEMORANDUM BRIEF, filed.

7/30/73 (JVS)(JI)(WMT) ORAL ARGUMENTS ON MOTIONS TO DISMISS: Argument of counsel. Motion of Floyd Martin to appear as friend of the court overruled. Case taken under advisement by the court. Brief to be filed within 10 days.

8/7/73 Floyd Travis Martin MOTION TO INTERVENE AS DEFENDANT, filed. M/D 9/10/73 by clerk.

8/9/73 Pltf. (73-H-1114(MOTION TO CONSOLIDATE, filed.

8/10/73 Pltf. (Universal Amusement) SUPPLEMENTAL BRIEF, filed.

8/16/73 Deft. (Dyson, et al) SUPPLEMENTAL BRIEF In Support of Their Motion to Dismiss, filed. (Copy).

8/21/73 TRANSCRIPT OF PROCEEDINGS of July 30, 1973, filed.

9/5/73 REPORTER'S TRANSCRIPT of Proceedings on May 2, 1973, filed.

9/7/73 (JRB) ORDER, filed, consolidating 3-7398, Associated Theaters v. Dyson, 3-7437-C, Associated Theaters v. Wade, (both in N/D of Texas); C.A. 73-H-1114, Hargrove, et al v. Hill, et al; and SA-72-CA-214, Southland Theaters v. Butler, et al (W/D of Texas) with this case for submission and hearing.

12/12/73 Pltfs' MOTION FOR RECONSIDERATION OF TEMPORATY RESTRAINING ORDER AND EQUITABLE RELIEF, filed. Parties ntfd. jb

12/17/73 BRIEF of the San Antonio Civil

Liberties Union -- Amicus Curiae, filed. (In connection with Ca-SA-73-CA-124)

12/17/73 (JVS) HEARING ON MOTION FOR RECONSIDERATION OF TEMPORARY RESTRAINING ORDER AND EQUITABLE RELIEF: Argument of counsel. Motion for TRO denied. Parties told to use state remedies.

1/8/74 TRANSCRIPT OF PROCEEDINGS, filed.

1/17/74 Pltf. Burke A. Hargrove's MOTION TO SUBSTITUTE EVIDENCE, filed.

1/17/74 (JVS) ORDER TO SUBSTITUTE EVIDENCE filed. Clerk of this Court to prepare duplicate copies of all original records heretofore submitted by the District Clerk of Brazos County, Texas, and that the originals be returned to said County, with costs of duplication to be charged to Plaintiffs. Parties ntfd. jab

4/22/74 In Cause No. A-74-Ca-078, Deft Bob Miles's NOTICE OF DEPOSITION of Roy Stambaugh and REQUEST FOR PRODUCTION OF DOCUMENTS, filed.

4/23/74 In Cause No. A-74-CA-078, Deft Bob Miles' ANSWER, filed.

4/26/74 In Cause No. A-74-CA-078, Deft Bob Miles' REQUEST FOR AD-

MISSIONS FROM PLAINTIFF SAN ANTONIO BOOK MART, INC., filed.

4/29/74 RESPONSE OF DOLPH BRISCOE, GOVERNOR OF THE STATE OF TEXAS, AND JOHN HILL, ATTORNEY GENERAL OF THE STATE OF TEXAS, filed.

4/29/74 (JVS) TEMPORARY RESTRAINING ORDER, filed and entered, regarding CA-A-74-CA-078, parties ntfd. rm

5/1/74 Deft Robert O. Smith's ANSWER, filed.

5/7/74 In CA-A-74-CA-078, Pltf's MOTION TO EXTEND TEMPORARY RESTRAINING ORDER, filed.

5/9/74 (JVS) ORDER EXTENDING TEMPORARY RESTRAINING ORDER, filed and entered regarding CA-A-74-CA-078, parties ntfd. rm

5/10/74 In CA-A-74-CA-078, Deft Bob Miles' NOTICE OF DEPOSITION of Pltf AND REQUEST FOR THE PRODUCTION OF DOCUMENTS, filed.

5/20/74 In CA-A-74-CA-078, Pltf San Antonio Book Mart, Inc.'s SECOND MOTION TO EXTEND TEMPORARY RESTRAINING ORDER, filed.

5/21/74 (JVS) SECOND ORDER EXTENDING TEMPORARY RESTRAINING ORDER, filed and entered, regarding CA-A-74-CA-078, extending temporary restraining order issued April 29, 1974 until a hearing on Pltf's motion for preliminary injunction or until May 29, 1974. Parties ntfd. jb

5/22/74 In CA-SA-73-CA-214, Pltfs Southland Theatres, Inc., Southland Theatres, Inc.-Main and King Arts Theatre, Inc.'s MOTION FOR SETTING ON PRELIMINARY AND PERMANENT INJUNCTION, filed. M/D 6/17/74 by Clerk

5/22/74 In CA-A-74-CA-078, Pltf's MOTION TO VACATE NOTICE OF DEPOSITION AND MOTION FOR PROTECTIVE ORDER, filed.

5/22/74 InCA-A-74-CA-078, Pltf's RESPONSE TO DEFENDANT MILES' REQUEST FOR THE PRODUCTION OF DUCMENTS filed.

5/22/74 (WS) ORDER, filed and entered, in CA-A-74-CA-078, entering a protective, order, staying the taing of the deposition noticed by Deft Bob Miles for May 23, 1974, at 8:00 a.m., until a determination of the merits of this motion by further orders of the court. Parties ntfd. jb

5/31/ In CA-A-74-CA-078, Pltf San Antonio Book Mart, Inc.'s THIRD MOTION TO EXTEND TEMPORARY RESTRAINING ORDER, filed.

5/31/74 (JVS) ORDER, filed and entered, ordering a preliminary injunction pursuant to Rule 65(a), Fed. R. Civ. P., issue and that this preliminary injunction shall remain in effect until the three-judge court can be convened. Parties ntfd. jb

6/10/74 In B-74-142-CA, Deft Dexter Patterson's ORIGINAL ANSWER, filed.

6/10/74 In B-74-142-CA, Deft. Tom Hanna's ORIGINAL ANSWER, filed.

6/13/74 In B-74-142-CA, RESPONSE OF THE STATE OF TEXAS, filed.

6/13/74 In B-74-142-CA, Return of Summons on Harold Clayton, executed 6/11/74, filed.

6/13/74 In B-74-142-CA, Return of Summons on Tom Hanna, executed 6/11/74, filed.

6/13/74 In B-74-142-CA, Return of Summons on Dexter Patterson, executed 6/11/74, filed.

6/24/74 In A-74-CA-078, Pltf's RESPONSES TO DEFENDANT MILES' REQUESTS FOR ADMISSIONS, filed.

7/24/74 (JRB) ORDER, filed and entered, consolidating SA-74-CA-168 with CA-73-H-528.

7/29/74 (JVS) TEMPORARY RESTRAINING ORDER, filed and entered, regarding SA-74-CA-168 parties ntfd. jb

7/29/74 (JVS) BOND, filed and entered in SA-74-CA-168, parties ntfd. jb

8/2/74 IN SA-74-CA-168, return of service on writ to serve copy of temporary restraining order on E. E. Peters, received in Western District of Texas, July 30, 1974, filed.

8/2/74 IN SA-74-CA-168, return of service on writ to serve copy of temporary restraining order on Ted Butler, received in Western District of Texas, July 30, 1974, filed.

8/5/74 In SA-74-CA-168, ORIGINAL ANSWER of Deft Emil E. Peters, Chief of Police, filed.

8/6/74 In SA-74-CA-168, Return of Summons on Ted Butler, executed 7/16/74, filed.

8/6/74 In SA-74-CA-168, Return of Summons on E. E. Peters, executed 7/16/74, filed.

8/6/74 In SA-74-CA-168, Return of Summons on John Hill, executed 7/16/74, filed.

8/6/74 In SA-74-CA-168, Return of Summons on Dolph Briscoe, executed 7/16/74, filed.

8/6/74 In SA-74-CA-168, Deft Ted Butler's MOTION FOR DISSOLUTION OF TEMPORARY RESTRAINING ORDER, filed. M/D 8/26/74 by Clerk

8/6/74 In SA-74-CA-168, Deft Ted Butler's ORIGINAL ANSWER, filed.

8/6/74 In SA-74-CA-168, ADVERSARY HEARING before Justice of Peace Fred Clark, filed.

8/6/74 In SA-74-CA-168, ADVERSARY HEARING before Justice of Peace J. P. Gutierrez, filed.

8/7/74 In SA-74-CA-168, RESPONSE OF NOMINAL DEFENDANTS DOLPH BRISCOE, GOVERNOR OF THE STATE OF TEXAS AND JOHN HILL, ATTORNEY GENERAL OF THE STATE OF TEXAS, filed.

8/7/74 (JRB) ORDER, filed and entered, consolidating SA-74-CA-176 with CA 73-H-528.

8/8/74 Return of Service on TRO on Ted Butler, executed 7/30/74, filed.

8/8/74 Return of Service on TRO on E. E. Peters, executed 7/30/74, filed.

8/9/74 Pltf Richard C. Dexter's MOTION TO EXTEND TEMPORARY RESTRAINING ORDER, in SA-74-CA-168, filed.

8/9/74 (JVS) ORDER EXTENDING TEMPORARY RESTRAINING

ORDER, filed and entered, extending restraining order issued July 29, 1974 for ten days from this date, unless extended by this court in SA-74-CA-168. Parties ntfd. jb

8/15/74 Pltfs' MOTION FOR DISMISSAL, filed.

8/20/74 (JVS) ORDER, filed. Pretrial conference held. In SA 74-CA-168, CA 6-346 and CA3-74-130 it is ordered that on or before September 6, 1974 at 5:00 the parties in each case will file an agreed pretrial order. On or before october 4, 1974 at 5:00 P.M. the parties in each case will file briefs concerning the legal issues presented in each case. In the rest of the consolidated cases a temporary injunction has been or will be entered pending the final disposition of these cases by a three-judge court. Parties ntfd. rm.

8/20/74 (JVS) ORDER, filed, severing and dismissing all plaintiffs and defendants in the cause numbered C. A. 73-H-528. However, as to the remaining plaintiffs and defendants in this consolidated cause of action said cause of action shall continue. Parties ntfd. rm.

8/21/74 Received Defts' NOTICE TO TAKE ORAL DEPOSITION of Pltf, filed August 14, 1974 in Northern District of Texas in CA-3-74--130-E.

8/21/74 Received Deft Tim Curry's MOTION TO COMPEL ANSWER TO INTERROGATORIES TO PLAINTIFF, filed August 19, 1974 in Northern District of Texas in CA-4-74-28.

8/21/74 Received Deft R. E. Ashmore's MOTION TO COMPEL ANSWER TO INTERROGATORIES TO PLAINTIFF, filed August 19, 1974 in Northern District of Texas in CA-4-74-45.

8/22/74 In SA-74-CA-176, Defts John L. Hill and Dolph Briscoe's ORIGINAL ANSWER, filed.

8/23/74 (JVS) ORDER EXTENDING TEMPORARY RESTRAINING ORDER, filed and entered, extending restraining order issued July 29, 1974 for ten days from this date, unless extended by this court in SA-74-CA-168. Parties ntfd. jb

9/3/74 (JVS) MOTION FOR TEMPORARY INJUNCTION AND ORDER in CA-4-74-28, filed. Motion to be heard at 9:30 a.m., September 6, 1974. Parties ntfd. jb

9/5/74 In CA-3-74-130-E, STIPULATIONS OF FACT, filed.

9/5/74 In CA-3-74-130-E, STIPULATIONS OF FACT, filed.

9/6/74 (JVS) TEMPORARY RESTRAINING ORDER, filed and entered, ordering that all state

proceedings anc activities with regard to Pltfs in the consolidated cases be enjoined and stayed until the three-judge panel can meet and decide
no pending state criminal prosecutions are enjoined and the State is free to bring to trial and try any such cases. This order shall not apply to Ellwest v. Walls, CA-4-74-45. Cinema X v. Curry & Walls, CA-4-74-28, Southland Theatres v. Butler, SA 74-CA-214 and Sun Family Entertainment v. Hanna, B-74-142 CA. Parties ntfd jb

9/6/74 Received DEPOSITION of Roy L. Stambaugh in A-74-CA-078, filed June 6, 1974, in Western District of Texas.

9/9/74 Received AMENDMENT BY STIPULATION in CA-3-74-130-E, Ellwest Stereo Theatres, Inc. vs. Donald Byrd, filed September 4, 1974, in Northern District of Texas.

9/12/74 (JRB) ORDER, filed and entered, consolidating A-74-CA-189, J. Norman Wells vs. Bob Miles with CA-73-H-528.

9/13/74 In CA-3-7347, BRIEF OF DEFENDANTS DISTRICT JUDGE WALKER, DISTRICT ATTORNEY WADE, AND ASSISTANT DISTRICT ATTORNEYS WEATHERLY, ETHINGTON, AND HAGLER, filed.

9/13/74 In CA-4-74-28 Deft T. S. Walls' ANSWER IN OPPOSITION TO INSTRUMENT DESIGNATED "MOTION FOR TEMPORARY INJUNCTION" filed by Plaintiff, Cinema X Inc., filed.

9/17/74 DEFT. TIM CURRY'S RESPONSE TO PLAINTIFF'S "MOTION FOR TEMPORARY INJUNCTION", filed. (CA-4-74-28)

9/17/74 MOTION FOR HEARING AND DETERMINATION BY THREE -JUDGE COURT (Tim Curry), filed. (CA-4-74-28)

9/17/74 (JVS) HEARING MOTION FOR TEMPORARY INJUNCTION: Appearances: Tom Higgins for plaintiffs' Joe Shannon, Jr. and S. Gl. Johndroe, Jr. for defendants. Argument of counsel and offering of exhibits. Court abstains from ruling on seizure of film pending ruling of the 3-Judge court.

9/18/74 Received entire file of A-74-CA-189, J. Norman Wells vs. Bob Miles, etc.

9/25/74 Received in CA-3-74-130-E, Defts' MOTION TO COMPEL DISCOVERY filed August 22, 1974 in Northern District of Texas.

9/27/74 (JRB) ORDER, filed and entered, consolidating CA-7-74-65 Carson, et al vs. Bailey, et al, CA-7-74-43,

Claybrook vs. Bailey, et al and CA-7-74-45 Lovely, et al, vs. Driver, et al with CA 73-H-528.

9/30/74 Received in A-74-CA-189,ANSWER OF DEFENDANT, BOB MILES filed September 24, 1974 in Western District of Texas

10/3/74 In CA-6-345 (Lubbock), Pltf's BRIEF NUISANCE - COMING IN THE BACK DOOR AGAINST FIRST AMENDMENT RIGHTS filed.

10/4/74 Received entire files in CA-7-74-65, CA-7-74-43 and CA-7-74-45.

10/7/74 Received in CA 7-74-43, Pltf's MOTION TO WITHDRAW AS ATTORNEY OF RECORD, filed September 30, 1974 in Northern District of Texas.

10/7/74 (JVS) ORDER, filed and entered, granting Pltf's Motion to Withdraw as attorney of record; thus removing the name of Tim M. Finnical. Parties ntfd. jb

10/7/74 Received in CA 7-74-43, Pltf's MOTION TO BE LISTED AS ATTORNEY OF RECORD, filed September 30, 1974 in Northern District of Texas.

10/7/74 (JVS ORDER, filed and entered, granting Motion to be listed as Attorney for in Pltf. Parties ntfd. jb

10/7/74 Received in CA 7-74-43, Pltf's MOTION TO BE LISTED AS ATTORNEY OF RECORD, filed September 30, 1974 in Northern District of Texas.

10/7/74 (JVS) ORDER, filed and entered, granting Motion to be listed as atty of record; thus entering the name of Bennie Juarez. Parties ntfd. jb

10/7/74 Received in CA 7-74-65, Defts H. Dale Bailey and H. Deloyd Bailey's MOTION TO DISMISS, filed October 2, in Northern District of Texas.

10/7/74 Received in CA-3-74-130-E, Defts Byrd and Southall's BRIEF, filed October 4, 1974 in the Northern District of Texas.

10/4/74 In SA-CA-176, Defts City of San Antonio Police Department, Chief Emil E. Peters & Captain James Despre's BRIEF, filed.

10/7/74 IN CA-3-74-130-E, Pltf's BRIEF IN SUPPORT OF PETITION FOR DECLARATORY RELIEF, filed.

10/8/74 TRANSCRIPT OF PROCEEDINGS, filed.

10/8/74 In A 74-CA-189, Wells vs. Miles, Pltf's MOTION FOR TEMPORARY RESTRAINING ORDER, filed.

10/16/74 In SA-74-CA-168, Pltf's Attorney J. Mack Ausburn's MOTION TO WITHDRAW AND FOR SUBSTITUTION OF COUNSEL, filed.

10/16/74 (JVS) ORDER, filed and entered, granting Pltf's Motion to Withdraw and for Substitution of Counsel. J. Mack Ausburn to withdraw with the appearance of Gerald H. Goldstein, Esq., 29th Floor, Tower Life Bldg., San Antonio, Texas and Frierson M. Graves, Esq., 2020 First National Bank Bldg., Memphis, Tennessee. Parties ntfd. jb

10/16/74 In SA-74-CA-168, Deft's Second MOTION FOR DISSOLUTION OF TEMPORARY RESTRAINING ORDERS AND FOR A CONVENTION OF THREE JUDGE COURT AND MOTION TO DISMISS, filed.

10/16/74 In SA 74-CA-168, Deft's BRIEF IN SUPPORT OF SECOND MOTION FOR DISSOLUTION OF TEMPORARY RESTRAINING ORDERS AND FOR CONVENTION OF THREE JUDGE COURT AND MOTION TO DISMISS, filed.

10/30/74 (JVS) ORDER, filed (SA 74-CA-168). Parties ordered to file stipulations by November 4, 1974. Parties ntfd. rm.

11/1/74 (JVS) HEARING ON MOTION FOR REMPORARY RESTRAINING ORDER: (A 74 CA 189) Argument of counsel. Court denies TRO.

11/4/74 In SA-74-CA-168, Pltf's RESPONSE TO COURT'S ORDER, filed.

11/5/74 In CA-6-345, Defts' BRIEF, filed.

11/13/74 In SA-74-CA-168, Pltf's BRIEF, filed.

11/13/74 In SA-74-CA-168, Deft's MOTION FOR INTRODUCTION OF EVIDENCE, filed.

11/13/74 In SA-74-CA-168, received Pretrial Order, Richard C. Dexter vs. Ted Butler, et al. (JVS) PRETRIAL ORDER, filed.

11/15/74 (JVS)(JI)(WMT) Oral arguments were held before the three judge court in CA-6-345 King Arts Theater Inc. vs. George E. McCrea et al; CA 3-74-130 Ellwest Stereo Theaters, Inc. vs. Donald Byrd, et al and SA-74-CA-168 Richard C. Dexter vs. Ted Butler, et al. Cases taken under advisement.

11/25/74 In CA-3-7347-C, APPELLANTS' BRIEF, filed.

12/2/74 IN CA 7-74-45, ENTRY OF DISMISSAL, filed November 25, 1974 in Northern District of Texas.

1/30/75 In SA-74-CA-315, Defts' MOTION TO DISMISS AND ANSWER, filed. M/D 2/10/75

1/30/75 In SA-74-CA-315, Defts' RESPONSE IN OPPOSITION TO PLAINTIFFS' MOTION FOR TEMPORARY RESTRAINING ORDER, filed.

1/30/75 In SA-74-CA-315 DEfts' MEMORANDUM BRIEF IN OPPOSITION TO PLAINTIFFS' MOTION FOR TEMPORARY RESTRAINING ORDER, filed.

1/30/75 In SA-74-CA-315, Defts' MOTION TO STRIKE FROM PLEADINGS ANY REFERENCE TO THE "PUSS 'N BOOTS CLUB", filed. M/D 2/10/75

2/6/75 (JRB) ORDER, filed and entered, consolidating SA-74-CA-315, McKenzie, et al vs. Ted Butler, et al with CA-73-H-528, filed January 28, 1975 in Western District.

2/20/75 COPY OF DECISION IN LOCKE V. STATE, 516 S.W.2d 949, submitted by Henry Wade, Criminal District Attorney of Dallas County, Texas, filed.

3/28/75 Received in SA-74-CA-315, Deft Ted Butler's ORIGINAL ANSWER TO PLAINTIFF'S ORIGINAL COMPLAINT, filed January 22, 1975 in Western District of Texas.

4/8/75 Received CA A-75-CA-34, Chris Gernon vs. Bob Simpson, et al file with Judge Brown's order consolidating with CA 73-H-528.

4/17/75 In B-74-142-CA, Sun Family Entertainment, Inc. vs. Hanna, Deft Harold R. Clayton's MOTION TO DISMISS, filed. M/D 5/12/78 by Clerk

5/13/75 In CA A-75-CA-34, Pltf's MOTION FOR TEMPORARY RESTRAINING ORDER OR PRELIMINARY INJUNCTION, filed.

5/13/75 In CA A-75-CA-34, Pltf's BRIEF IN SUPPORT OF MOTION, filed.

5/16/75 (JVS) ORDER, filed and entered, in SA-74-CA-315, granting Defts' Motion to Strike for Plfts' Pleadings any Reference to the "Puss 'N Boot Club". The ruling on the motion to dismiss will not be made at this time since the court anticipates that an opinion which will affect the motion, will be shortly forthcoming. Parties ntfd. jb

6/4/75 In A-75-CA-34, Chris Gernon vs. Bob Miles, et al, Defts' MOTION IN OPPOSITION TO PLAINTIFF'S MOTION FOR TEMPORARY RESTRAINING ORDER OR PRELIMINARY INJUNCTION, filed.

6/4/75 In A-75-CA-34, Defts' BRIEF IN

SUPPORT OF MOTION, filed.

6/5/75 (JVS) ORDER, filed and entered, in CA B-74-142-CA, dismissing Judge Harold R. Clayton from the suit. Parties ntfd. jb

6/5/75 (JVS) ORDER, filed and entered, in CA A-75-CA-34, holding in abeyance the motion for temporary restraining order or preliminary injunction until the release of the forthcoming court's opinion. Parties ntfd. jb

7/3/75 (JI)(JVS)(WMT) OPINION AND ORDER, filed. (See instrument for details) Parties ntfd. rm. All consolidated files returned to court of origin.

8/1/75 State's NOTICE OF APPEAL TO THE COURT OF APPEALS FOR THE FIFTH CIRCUIT, filed.

8/4/75 Defts Byrd and Southall's NOTICE OF APPEAL to Fifth Circuit, filed.

8/4/75 Defts Byrd and Southall's Notice of Appeal to U. S. SUPREME COURT, filed.

8/14/75 138 In SA-74-CA-168 and SA-72-CA-214's MOTION FOR RELIEF FROM JUDGMENT OR ORDER AND FOR CORRECTION OF JUDGMENT OR ORDER, filed. (Ted Butler, et al vs. Southland Theaters, Inc.)

8/21/75 139 In SA-75-CA-168 and SA-72-CA-214's MOTION FOR ENTRY OF SEPARATE JUDGMENT, filed.

8/25/75 140 Notice of Appeal on behalf of TED BUTLER, ET AL., in Civil Action NO. SA-72-CA-214 to FIFTH CIRCUIT, filed.

8/25/75 141 Notice of Appeal on behalf of TED BUTLER, ET AL., in Civil Action NO. SA-72-CA-214 to U.S. SUPREME COURT, filed.

8/29/75 142 (JVS) LETTER ORDER, filed, directing the substitution of corrected page 60 in the Opinion filed July 3, 1975. Copies mailed to all parties.

8/29/75 143 (JVS) ORDER (CA 73-H-1114), filed, remanding case to district judge in whose court the case was originally filed to be disposed of in accordance with that opinion, specifically page 60 thereof. Parties ntfd. rm.

8/29/75 144 (JVS) ORDER (CA-7-74-43), filed, remanding case to the district judge in whose court the case was originally filed to be disposed of in accordance with that opinion, specifically page 60 thereof. Parties ntfd. rm.

8/29/75 145 (JVS) ORDER (CA-7-74-65), filed, remanding the case to the district judge in whose court the case was originally filed to be disposed of in accordance with that opinion, specifically page 60 thereof. Parties ntfd. rm.

8/29/75 146 (JVS) ORDER (CA-7-74-45), filed, remanding case to the district judge in whose court the case was originally filed to be disposed of in accordance with that opinion, specifically page 60 thereof. Parties ntfd. rm.

8/29/75 147 (JVS) ORDER (SA-74-CA-315), filed, remanding the case to the district judge in whose court the case was originally filed to be disposed of in accordance with that opinion, specifically page 60 thereof. Parties ntfd. rm.

8/29/75 148 (JVS) ORDER (SA-74-CA-176), filed, remanding case to the district Judge in whose court the case was originally filed to be disposed of in accordance with that opinion, specifically page 60 thereof. Parties ntfd. rm.

8/29/75 149 (JVS) ORDER (SA-73-CA-214), filed, remanding case to the district Judge in whose court the case was originally filed to be disposed of in accordance with that opinion, specifically page 60 thereof. Parties ntfd. rm.

8/29/75 150 (JVS) ORDER (CA 3-7398-C), filed, remanding case to the district Judge in whose court the case was originally filed to be disposed of in accordance with that opinion, specifically page 60 thereof. Parties ntfd. rm.

8/29/75 151 (JVS) ORDER (CA 3-7024-C), filed, remanding case to the district Judge in whose court the case was originally filed to be disposed of in accordance with that opinion, specifically page 60 thereof. Parties ntfd. rm.

8/29/75 152 (JVS) ORDER (CA 3-7347-C), filed, re-

manding case to the district Judge in whose court the case was originally filed to be disposed of in accordance with that opinion, specifically page 60 thereof. Parties ntfd. rm.

8/29/75 153 (JVS) ORDER (CA A-74-CA-189), filed, remanding case to the district judge in whose court the case was originally filed to be disposed of in accordance with that opinion, specifically page 60 thereof. Parties ntfd. rm.

8/29/75 154 (JVS) ORDER (CA A-74-CA-078), filed, remanding case to the district judge in whose court the case was originally filed to be disposed of in accordance with that opinion, specifically page 60 thereof. Parties ntfd. rm.

8/29/75 155 (JVS) ORDER (CA A-75-CA-34), filed, remanding case to the district judge in whose court the case was originally filed to be disposed of in accordance with that opinion, specifically page 60 thereof. Parties ntfd. rm.

8/29/75 156 (JVS) ORDER (B-74-142-CA), filed remanding case to the district judge in whose court the case was originally filed. Parties ntfd.

8/29/75 157 (JVS) ORDER (CA-4-74-29), filed, remanding case to the district judge in whose court the case was originally filed. Parties ntfd.

8/29/75 158 (JVS) ORDER (CA-4-74-45), filed, remanding case to the district judge in whose court the case was originally filed. Parties ntfd.

9/4/75 159 Deft. Ted Butler's Designation of Record to Court Reporter and U.S. Dist. Clerk, filed. (Copy furnished Ct. Reporter.)

9/4/75 160 Deft. Ted Butler's Motion for Suspension of Court's Final Orders and Permanent Injunction Pending Appeal, filed.

9/4/75 161 Brief in Support of Motion for Suspension of Court's Final Orders. Pending Appeal, filed.

9/10/75 162 Notice of Appeal on behalf of TED BUTLER, ET AL. to FIFTH CIRCUIT, filed.

9/10/75 163 Notice of Appeal on Behalf of TED BUTLER, ET AL. to U.S. SUPREME COURT, filed.

9/10/75 164 Cost Bond on Appeal, filed.

10/3/75 165 (COB) Order Extending time for docketing record on appeal, filed. (Copies to Ct. Appeals, Ct. Reporter & Attys)

10/3/75 166 In SA-74-Ca-168 and SA-73-CA-214, Defts' MOTION TO VACATE DECISION OF THREE-JUDGE COURT AND REMAND TO ORIGINATING COURT/ALTERNATIVELY MOTION TO RETRIEVE RECORD, filed.

10/7/75 167 Transcript of Proceedings, in Duplicate, filed. (In CA 3-74-130, Ellswest Stereo Theatres, Inc., vs. Donald Byrd, et al)

10/9/75 168 In SA-74-CA-168, Defts' SECOND MOTION FOR ENTRY OF SEPARATE JUDGMENT filed.

10/14/75 169 Stipulation for Dismissal of Appeal, filed.

10/14/75 170 (JVS) Order Dismissing Appeal, filed. (Attys notified) (As to Defts DONALD BYRD and MEL SOUTHALL, only)

10/15/75 171 SWORN AFFIDAVIT OF DOUGLAS C. YOUNG, with Exhibits, filed.

10/17/75 172 SUPPLEMENTAL SWORN AFFIDAVIT OF DOUGLAS C. YOUND, filed.

10/20/75 173 Defts' THIRD MOTION FOR ENTRY OF JUDGMENT/OR TO VACATE JUDGMENT in SA-74-CA-168 and SA-73-CA-214, filed.

11/3/75 174 Defts' FOURTH MOTION FOR ENTRY OF JUDGMENT/OR TO VACATE JUDGMENT in SA-74-CA-168, filed.

11/4/75 175 (JVS) FINAL JUDGMENT, filed and entered. In accordance with this court's memorandum opinion entered on July 3, 1975, it is ordered that the Texas statute designated as article 4667(a)(3) of Vernon's Annotated Civil Statutes is unconstitutional on its face in case CA-6-345, King Arts Theatre v. McRea. Also pursuant to same memorandum opinion having concluded that §16.01 of the Texas Penal Code was applied in an unconstitutional manner to the plaintiff Dexter, this court enjoins the state prosecuting pltf Dexter with regard to incidents occurring on June 24, June 28, and July 2, 1974. This injunction includes a restraint on any futhre prosecution of any motion picture exhibitor. This is in regards to SA 74-CA-168, Richard Dexter v. Ted Butler. In CA-3-74-130-E,

Ellwest Stereo Theatre, Inc. v. Donald Byrd, et al., in accord with this court's memorandum opinion, it is ordered that the language "Or commonly used in" in the Texas Statute designated as article 18.02(2) is unconstitutionally vague and overbroad and is unconstitutional as applied to Ellwest Stereo Theatres, Inc., etc., Parties ntfd. jb

11/11/75 176 Notice of Appeal to Fifth Circuit by Deft. Ted Butler, filed. (Copies mailed to Parties)

11/11/75 177 Notice of Appeal to Supreme Court by Deft. Ted Butler, filed (Copies mailed to Parties)

9/28/77 75-4312 Original Opinion of the United States Court of Appeals for the Fifth Circuit. Entered a reversal in one case (King Arts v. McCrea), and remanded in the other case (Dexter v. Butler).

12/1/77 75-4312 Petition for Rehearing and Petition for Rehearing En Banc granted.

12/18/78 75-4312 Opinion of Court of Appeals For the Fifth Circuit held that Art. 4667(a)(3) is unconstitutional insofar as it authorized injunctions against the future exhibition of unnamed films (reversing Judgment of the Panel of the Court of Appeals and affirmed Judgment of the District Court). Enter--Judgment Dates

1/15/79 75-4312 Notice of Appeal to the Supreme Court of the United States.

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
SAN ANGELO DIVISION

KING ARTS THEATRE, INC.,	)(	
	)(	
Plaintiff,	)(	
	)(	
V.	)(	CIVIL ACTION
	)(	NO. SA-73-CA-214
GEORGE E. McCREA, County Attorney of Tom Green County; JOHN HILL, Attorney General of the State of Texas; and DOLPH BRISCOE, Governor of the State of Texas,	)(	
	)(	
Defendants.	)(	

COMPLAINT

TO THE HONORABLE JUDGE OF SAID COURT:

1. Plaintiff is a corporation organized and doing business under the laws of the State of Texas and operates a motion picture theater in San Angelo, Tom Green County, Texas.

2. Defendant George E. McCrea is the County Attorney of Tom Green County, Texas; defendant John Hill is the Attorney General of the State of Texas and defendant Dolph Briscoe is the Governor of the State of Texas, both of whom are made parties hereto for purposes of giving notice as required by 28 U.S.C. §2284(2), and are sued herein only in their official capacities.

3. This is an action to redress the deprivation under color of state law of the rights, privileges or immunities secured to the plaintiffs by the Constitution of the United States. It is further an action under the Federal Declaratory Judgment Act, 28 U.S.C. §2201, seeking a

declaratory judgment that certain statutes of the State of Texas are unconstitutional on their face or as applied and seeking injunctive relief against the continued enforcement thereof against the plaintiff. This is further an action for a statutory court of three judges in accordance with the provisions of 28 U.S.C. §2281 and §2284.

4. Defendant John Hill as Attorney General of the State of Texas is charged with responsibility of enforcing the laws of the State of Texas in a lawful and legal manner and as such, has general supervision over various county attorneys of the State of Texas. Plaintiffs aver that any injunction against the Attorney General of the State of Texas would be binding also upon all those other law officials under the supervision and direction of said Attorney General so as to insure uniform application of the laws throughout the State of Texas.

5. This court has jurisdiction of the subject matter of this action pursuant to 28 U.S.C. §1343(3), §1343(4), 42 U.S.C. §1983 and §1985(3), and 28 U.S.C. §2201 and §2281.

6. The plaintiff for some period of time has been engaged in the operation of motion picture theaters in San Angelo, Tom Green County, Texas, and has been exhibiting motion pictures in an enclosed theater in which it has advertised that the films are for "adults only" so as not to thrust the films on an unwilling person. Admission is limited to adults and no minors are admitted to said theater. There is no pandering in the advertisements and the theaters are not intended to offend anyone. Plaintiff avers that there are similarly situated theaters in the State of Texas, and further that there are also establishments which offer for sale magazines and books for adults only and have motion picture theaters in connection therewith.

7. Plaintiff desires to continue to operate a motion

picture theater and to abide by all lawful provisions of law for the showing of motion pictures.

8. Plaintiffs aver that in light of the recent rulings of the United States Supreme Court on June 21, 1973 and June 25, 1973, in *Miller v. California, Paris Adult Theater I v. Slaton, Kaplan v. California, Heller v. New York, Roaden v. Kentucky, Alexander v. Virginia*, and others, that a great deal of confusion has been created in the field of materials protected or unprotected by the First Amendment. As a result of said rulings, various statements have been made by public officials in San Angelo County, including the defendant George E. McCrea, and various actions have taken place, known and unknown to the plaintiff, which may seriously affect their businesses.

9. Plaintiffs desire to abide by any specifically defined conduct in a lawful state statute as to what motion pictures and/or other materials protected by the First Amendment may contain but that in light of the confusion and the statements by the defendant, George E. McCrea, and others, there appears to be threatened action against them in the immediate future involving statutes stated herein, which statutes are unconstitutional on their face and as applied. Plaintiff avers that its lease has been cancelled as shown by the attached letter marked Exhibit A and incorporated herein by reference.

10. Plaintiff avers that as a person entitled to rights under the United States Constitution that the statutes herein are so vague and indefinite in the light of the rulings of the United States Supreme Court and are unconstitutional and void as a prior restraint and in violation of the First and Fourteenth Amendments as well as being vague and overbroad.

11. Plaintiff avers that it desires to continue to operate in a lawful manner motion picture theaters without interference, harrassment, or intimidation of

itself, its servants, employees, lessor or any other person connected with it by defendants or any other person acting under the color of law.

12. Plaintiff avers that because of the actions of the defendant and other public officials, including the statement that the defendant McCrea intended to act on the so-called nuisance statute for an injunction to close the theater, or any use of the term"obscene" in applying for a nuisance should not be permitted because under the existing Texas statute the plaintiffs could never be afforded fair notice of the prohibited activity, nor could others similarly situated.

13. Plaintiff avers that any action by the County Attorney on a nuisance theory pursuant to Articles 4666 and 4667 of Vernon's Annotated Civil Statutes of Texas and Article 513 of Vernon's Annotated Penal Code of Texas to close plaintiff's motion picture theater for one year is a flagrant and patent violation of express constitutional prohibitions which guarantee freedom of speech, due process and equal protection of the law under the First and Fourteenth Amendment and rights under the Fifth Amendment that no man's property may be taken without just compensation. Plaintiff avers that the personal property in the theaters is great and that the cancellation of the lease terminating the theater's right to operate constitutes irreparable harm and injury and has a chilling effect and plaintiff is entitled to declaratory judgment and injunctive relief declaring its rights under Articles 4666, 4667 and 513. Each motion picture shown in the future must be judged upon its own and the closing of a motion picture theater on the basis of showing allegedly obscene movies and the threat of contempt for the showing of any motion picture in the future is the most patent form of censorship and prior restraint.

14. Plaintiff avers that the use of the nuisance statute, Articles 4666 and 4667 of Vernon's Annotated

Civil Statutes which define a disorderly house as a motion picture theater showing obscene films as the term obscene is defined in the Penal Code and more particularly 513 of Vernon's Annotated Penal Code of Texas is unconstitutional on its face and cannot be constitutionally applied to a motion picture theater subject to First Amendment protection for the following reasons:

(a) The public nuisance law cannot be asserted against motion pictures since each particular motion picture must be judged upon its own and the denial of the right of the plaintiff to show a motion picture is prior restraint and in violation of the First and Fourteenth Amendments and Article 1, Section 8 of the Texas Constitution.

(b) The statutory provisions are an unconstitutional prior restraint on freedom of speech and expression and in violation of the First and Fourteenth Amendments.

(c) The use of a nuisance statute is tantamount to a censorship statute and the necessary provisions for any censorship statute are not included, which are: That each picture must be judged upon its own; the burden of proof is upon the alleged censor; and there must be a provision for maintaining the status quo, a prompt judicial hearing, and a prompt judicial determination.

(d) The said statutory provisions violate the First Amendment to the United States Constitution by utilizing the characterization of "nuisance" which is too general and indefinite and leaves to the Executive and Judicial Branches too wide a discretion in its application. For example, it authorizes the confiscation and restraint of non-obscene material simply because it happens to be in the presence of obscene material.

(e) The statutory provisions do not contain the minimum necessary procedural safeguards to offer

motion pictures protected by the First Amendment the protection to which they are entitled.

(f) The statutory provisions are too vague and indefinite to be applied to the First Amendment rights.

(g) The statutory provisions are over broad and void for vagueness.

(h) The statutory provisions lack the necessary scienter provisions requisite to the regulation of allegedly obscene material

(i) The statutory provisions deny constitutionally requisite procedural protection for non-obscene materials, in that they provide that the person alleged to be maintaining a nuisance come forward with evidence and maintain the burden of proof that he does not maintain a nuisance, and do not provide for an expeditious rendering of judgment by the trial court or for expeditious appeal and final judgment.

(j) The statutory provisions deny free speech the protection to which it is entitled by providing that evidence of the general reputation of the business shall be admissible into evidence, and judgment may be based on the general reputation so proven.

(k) The said statutory provisions are repugnant to the due process clause of the Fourteenth Amendment because the concept of public nuisance is too broad and too vague a term to proscribe activity as beyond the First Amendment protection.

(l) The said statutory provisions fail to guarantee prompt final judicial determination of the First Amendment issue involved in cases concerning motion pictures.

(m) The said statutory provisions seek to achieve ends by means which sweep unnecessarily broadly and

thereby invade the area of protected First Amendment freedoms.

(n) The said statutory provisions do not contain necessary procedural safeguards for the protection of free speech in that they do not assure the plaintiff an opportunity to marshal his evidence in his defense adequately prior to the judicial hearing required.

(o) The statute places the burden of possible contempt action upon the plaintiff if it seeks to show any motion picture in the future if a court should find a nuisance exists because of the showing in the past of an obscene motion picture film.

(p) The term "obscene" as defined in the Texas statute is vague and indefinite and unconstitutional on the grounds of void-for-vagueness and overbreadth and upon the further grounds set forth hereafter, and therefore cannot be used in the nuisance statute.

(q) The statute is in violation of the Fifth Amendment in that no man's property shall be taken without just compensation.

15. Plaintiffs aver that the Texas "disorderly house" statute, Article 513 is unconstitutional on its face and as applied on the following grounds:

(a) The statute including the definition of obscenity is void for vagueness.

(b) The statutes are void for overbreadth.

(c) The statutes are void for vagueness in that they fail to provide adequate notice to persons of the type of conduct that the statute prohibits from dissemination in that it fails to give a person of ordinary intelligence fair notice that his contemplated conduct is forbidden by the statute.

(d) The statue is void for vagueness in that stricter

standards of permissible statutory vagueness must be applied to a statute potentially inhibiting free speech.

(e) The statute is void for vagueness in that the definition of obscenity is not drawn as narrowly as possible so as to minimize interference with protected expression.

(f) The statute is void for vagueness in that it fails to adequately incorporate procedures that insure against the curtailment of constitutionally protected speech.

(g) The statute is unconstitutional and void in that it has been rejected in toto by both majority and minority opinions of the United States Supreme Court and "abandoned as unworkable by its author and no member of the (Supreme) Court today supports the *Memoirs* formulation" which is the Texas statute.

(h) The statute fails to *specifically* define by applicable state law the sexual conduct which is prohibited.

(i) The Texas statute is unconstitutional in that sexual conduct is not specifically defined by the regulating state law as written and said state law is incapable of any construction to uphold its constitutionality.

(j) The statute provides no procedural safeguards and is a prior restraint, therefore, and an abridgement of freedom of speech in violation of the First and Fourteenth Amendment.

(k) The statutes are a prior restraint in violation of First Amendment freedoms and an attempt to force motion picture operators and plaintiff to work as unpaid censors of what Texans are to be allowed to see.

(l) The statutes fail to require an affirmative showing of specific scienter relating to the obscene

nature of the material in the constitutional sense.

(m) The statute on its face is repugnant to the due process clause and no specification of the details of the offense intended to be charged can serve to validate it.

16. Plaintiff avers that if said statutes as threatened to be enforced against the plaintiff and others similarly situated are enforced that the conduct will cause them irreparable harm and injury and deprive the plaintiffs of their rights, privileges and immunities secured by the Constitution.

17. Plaintiff further avers that a similar nuisance statute has beed declared unconstitutionally void by a three-judge District Court sitting in the Northern District of Ohio in *Pursue Ltd., et al v. Lawrence S. Huffman*, and that a stay of the order of the Court has been denied by the United States Supreme Court and a copy of said opinion is attached and incorporated herein.

18. Plaintiff avers that the statutes herein should be declared unconstitutional and void and the defendants enjoined if necessary.

WHEREFORE, PREMISES CONSIDERED, PLAINTIFF PRAYS:

1. That the defendants be required to answer this complaint in conformity with the rules and practices of this Honorable Court.

2. For a declaratory judgment that the Texas statutes, Articles 4666 and 4667 of the Civil Code and 513 of the Penal Code be declared unconstitutional on their face or that said statutes cannot be constitutionally applied to a motion picture theater.

3. That this Court issue a preliminary and a permanent injunction restraining and enjoining the defendants, their agents, servants, and employees from

enforcing the Texas Statutes, Articles 4666 and 4667 of the Civil Code, and Article 513 of the Penal Code.

4. That a statutory court of three judges be convened to hear this cause.

5. That the plaintiff have such other, further and general relief as it may be entitled to in the premises.

J. Mack Ausburn

Frierson M. Graves, Jr.

Attorneys for Plaintiff

OF COUNSEL:
HEISKELL, DONELSON,
ADAMS, WILLIAMS &
WALL
2020 First National Bank Bldg.
Memphis, Tennessee 38103

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FOURTH FLOOR, PETROLEUM BUILDING
SAN ANGELO, TEXAS 76901

Ralph Logan
Tom Lear
Tom C. Massey
Greg Gossett
George W. Harrison
Gregg Owens

P.O. Drawer 911
Telephone (915) 605-0119

October 30, 1973

King Arts Theatre, Inc.
c/o Trademark Theatres, Inc.
830 So. Cooper Street
Memphis, Tennessee 38104

Gentlemen:

We represent Modern Home Builders Corporation; in fact, the president of this corporation, T. R. Logan, is the father of the writer.

Mr. George E. McCrea, the Tom Green County Attorney, has contacted Modern Home Builders and advised that in view of the number of complaints he has had concerning the pornographic pictures displayed at your theaters here, he intends to bring application for an injunction to prohibit future showing of illegal films. Of course, such an application would have to join Modern Home Builders Corporation, and since my father is advanced in years I do not want him to have to be embarrassed over this matter and neither does he want to have his corporation joined in such a suit.

We believe that Paragraph 3rd of your lease contract requires compliance with all requirements imposed by the police departments for the correction, prevention and abatement of nuisances in, upon or connected with

said premises. Modern Home Builders Corporation is, therefore, terminating your lease as of November 15, 1973. We trust that you will advise that you will give possession of the buildings by that date.

Very truly yours.

LOGAN, LEAR, MASSEY
& GOSSETT

Ralph Logan

RL:LT

EXHIBIT A

LOGAN-FORD COMPANY
REALTORS
FIRE INSURANCE, PROPERTY MANAGEMENT,
LOANS
30 WEST TWOHIG AVENUE

SAN ANGELO, TEXAS
76901

February 8, 1972

KING ARTS THEATRE, INC.

We hereby agree to transfer the lease on the building at 20 West Concho Street, San Angelo, Texas, the lease being dated 15 October, 1970 and ending 14 October, 1976.

We hereby agree to transfer this lease to you as of 15 February, 1972.

Signed,

MODERN HOME BUILDERS CORPORATION

By:

TRL:
President

STATE OF TEXAS)(
)(KNOW ALL MEN BY
)(THESE PRESENTS:
COUNTY OF TRAVIS)(

THAT, Charles Eikel Blumb, of the County of Tarrant, State of Texas, individually and acting as President of Texas Cinne Arts Inc., for and in the consideration of the sum of Ten Dollar, ($10.00) and other good and valuable consideration to me in hand paid by Ball Theatre Inc., King Arts Inc., San Angelo, King Arts Inc., San Antonio, and Texas Arts Theatre Inc. the receipt of which is hereby acknowledged, have this day Sold, Conveyed, Transferred and Assigned and by these presents do Sell, Convey, Transfer and Assign unto the said Ball Theatre Inc., King Arts Inc., San Angelo, King Arts Inc., San Antonio, and Texas Arts Theatre Inc. four (4) certain lease agreements described as follows:

(A) A lease dated 5th August, 1970, between GKM Properties, a partnership and Texas Cinne Arts Inc. covering premises known as 232 Broadway, and being a part of Lots 4, 5, and 6, Block 24, NCB 421, in the City of San Antonio, Bexar County, Texas, and formerly occupied by the John Herwick Company:

(B) A lease dated 30th of June, 1971 between O. L. Nelms and Charles E. Plumb, covering premises known as 2515 West Jefferson Blvd., Grand Prairie, Texas, and being the southermost corner of that certain building designated as 2515 West Jefferson Blvd. being 20 foot wide and 100 feet deep:

(C) A lease dated the 28th day of August, 1970, between Modern Home Builders Corp. and King Arts Theatre covering premises known as 20 East Concho Street, San Angelo, Texas:

(D) A lease dated 1st of July, 1970, between George

Plomarity and Texas Cinne Arts Inc. covering premises known as 805-807 North Chaparral. Lease expires on July 31, 1978. AND we do further Grant, Sell and Convey unto the said Ball Theatre Inc., King Arts Inc., San Angelo, Texas, King Arts Inc., San Antonio, Texas, and Texas Arts Theatre Inc. all the rights, title interest in the name, reputation and good will of said theatres.

TO HAVE AND TO HOLD unto the said Ball Theatre Inc., Flag Arts Inc., San Angelo, Texas, King Arts Inc., San Antonio, and Texas Arts Theatre Inc. and their successors, heirs and assigns, the above described leases together with any and all rights, equities, remedies, privileges, titles and interest in and to said land which we have by virtue of being the legal holders and owners of said leases.

EXECUTED this 11th day of February, 1972.

CHARLES E. PLUNS - INDIVIDUALLY

CHARLES E. PLUNS
PRESIDENT OF TEXAS CINNE ARTS INC.

STATE OF TEXAS)(
)(KNOW ALL MEN
COUNTY OF TOM)(BY THESE
GREEN)(PRESENTS:

THIS AGREEMENT OF LEASE, Made this 28 day of August A.D. 1979 by and between MODERN HOME BUILDERS CORPORATION, known herein as LESSOR, and KING ARTS THEATRE, known herein as LESSER.

(The terms "Lessor" and "Lessee" shall be construed in the singular or plural number according as they respectively represent one or more than one person.)

WITNESSETH, That the said Lessor does by these presents lease and demise unto the said Lessee the following described property, to-wit: Lying and being situated in San Angelo, County of Tom Green, State of Texas, and being 20 East Concho Street, San Angelo, Texas.

for the term of Three years with option of three years beginning the 15th day of October A.D., 1970 and ending the 14th day of October A.D., 1976 paying therefor the sum of Forth Five Hundred & No/100 ($4,500.00) DOLLARS, payable first and last month's rent, the sum of $250.00, with rent payable on the 15th day of each month thereafter.

upon the conditions and covenants following:

First, that Lessee will well and PUNCTUALLY pay said rents in manner and form as hereinbefore specified, and quietly deliver up said premises on the day of the expiration of this lease, in as good condition as the same were in when received, reasonable wear and tear thereof excepted.

Second, That the said premises shall be used for King Arts Theatre and for no other purpose.

Third, That Lessee will not sub-let said premises, or any part thereof, to any person or persons whatsoever, without the consent of said Lessor, IN WRITING, thereto first obtained.

Fourth, That on failure to pay the rent in advance, as aforesaid, or comply with any of the foregoing obligations, or in violation of any of the foregoing covenants, the Lessor may declare this lease forfeited at their discretion and agent or attorney shall have the power to enter and hold, occupy and repossess the entire premises hereinbefore described, as before the execution of these presents.

NOTE: Formal Execution And Acknowledgement Portions Of Lease Are Omitted.

IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF TEXAS

SAN ANGELO DIVISION

KING ARTS THEATRE, INC., Plaintiff	)(	
V.	)(	CIVIL ACTION NO. CA-6-345
GEORGE E. McCREA, County Attorney of Tom Green County; JOHN HILL, Attorney General of the State of Texas; and DOLPH BRISCOE, Governor of the State of Texas, Defendants	)(	

DEFENDANTS' JOINT ORIGINAL ANSWER

TO THE HONORABLE JUDGE OF SAID COURT:

NOW COME the Defendants in the above entitled and numbered cause, represented herein by John L. Hill, Attorney General of Texas, and file this their Original Answer and in support thereof would show unto the Court:

I.

Defendants deny that the Plaintiff is a corporation organized and doing business under the laws of the State of Texas and operates a motion picture theater in San Angelo, Tom Green County, Texas.

II.

Defendants admit that the named party Defendants are acting in their official capacities as set out in Plaintiff's numbered paragraph 2 but Defendants deny

any participation other than that in their official capacities.

III.

The allegations of numbered paragraph 3 of Plaintiff's complaint are admitted as to the provisions of law cited, but are denied insofar as it is alleged that there has been any deprivation by Defendants of any right, privilege or immunity secured by the Constitution or laws of the United States.

Defendants deny that jurisdiction exists in this Court for the granting of declaratory judgment pursuant to Title 28 U.S.C. §2201 or for the convening of a three-judge court under the provisions of Title 28 U.S.C., §2281 and §2284.

IV.

The Defendant John L. Hill admits that he is the Attorney General of the State of Texas and that he is charged with the responsibility of enforcing the laws of the State of Texas in a lawful and legal manner. However, he denies that he has general supervision over the various county attorneys of the State of Texas or that any injunction against the Attorney General of the State of Texas would be binding upon any other law officials of the State of Texas in the performance of their duties in the enforcement of the laws of this state.

V.

The Defendants deny that jurisdiction exists in this honorable court under Title 42 U.S.C. §1983 and 28 U.S.C. §1343(3)(4) and §1985(3). Defendants again deny that jurisdiction exists in this court for the granting of declaratory judgment pursuant to Title 28 U.S.C., §2201 for the convening of a three-judge federal court under Title 28 U.S.C., §2281.

VI.

Defendant is not in any position to know whether the Plaintiff herein operates a motion picture theater in San Angelo, Texas and cannot, therefore, admit nor deny the allegations set out in paragraph 5 of Plaintiff's complaint.

The Defendants admit that there is a theater in San Angelo, Texas, exhibiting "adult-type" movies; but Defendants deny that admission is limited to adults and that no minors are admitted to said theater and furthermore deny that there is no pandering in Plaintiff's advertisement for its theater.

Defendants can neither admit nor deny that there are similarly situated theaters in the State of Texas although Defendants admit that there are other theaters exhibiting similar matter.

VII.

Defendants admit Plaintiff's desire to continue operation of motion picture theaters. However, Defendants deny Plaintiff's desire to abide by all lawful provisions for the showing of motion pictures.

VIII.

The Defendants can neither admit nor deny most of the allegations in paragraph 7 of Plaintiff's original complaint because of the vagueness under which the allegations are drafted. The Defendant, George E. McCrea, admits that he has made certain statements regarding his intention to enforce the laws of the State of Texas in his jurisdiction.

IX.

The Defendants deny in toto the allegations in paragraph 9 of Plaintiff's original complaint.

X.

The Defendants say that they do not know which statutes are referred to in paragraph 10 of Plaintiff's original complaint but deny that any of the statutes relating to the prosecution of obscenity have been held to be so vague and indefinite as to be unconstitutional and void as a prior restraint and therefore violative of the First and Fourteenth Amendments of the Constitution of the United States.

XI.

Defendants do not deny that Plaintiff desires to continue operation of its motion picture theater; however, Defendants do deny that the Plaintiff wishes to continue operation in a lawful manner.

XII.

Paragraph 12 of the Plaintiff's original complaint is so vague and indefinite that Defendants can neither admit nor deny the allegations contained therein. However, The Defendant, McCrea, does intend to seek an injunction in the state courts of the State of Texas in an effort to terminate the unlawful activities of the Plaintiff in showing obscene material in a theater located in Tom Green County, Texas. The Defendants deny that Plaintiff can never be afforded fair notice of the prohibited activity which is sought to be restrained.

XIII.

The Defendants deny the assertions contained in paragraph 13 of Plaintiff's complaint. In this connection the Defendants would show that it is impossible to institute legal proceedings to terminate the unlawful activities of Plaintiff's prior to January 1, 1974. The Defendants would further show that on January 1, 1974, Article 4667, Vernon's Annotated Civil Statutes and Article 512, Vernon's Annotated Penal Code will be

repealed and that such statutes will be replaced by acts of the 63rd Legislature of the State of Texas. Article 4667, Vernon's Annotated Civil Statutes was amended by the 63rd Legislature to read as follows:

> "Article 4667, Revised Civil Statutes of Texas, 1925, as amended, is amended to read as follows:
>
> '(a) The habitual use, actual, threatened or contemplated, of any premises, place or building or part thereof, for any of the following uses shall constitute a public nuisance and shall be enjoined at the suit of either the State or any citizen thereof:
>
> '(1) For gambling, gambling promotion, or communicating gambling information prohibited by law;
>
> '(2) For the promotion or aggravated promotion of prostitution, or compelling prostitution;
>
> '(3) For the commercial manufacturing, commercial distribution, or commercial exhibition of obscene material;
>
> '(4) For the commercial exhibition of live dances or exhibition which depicts real or simulated sexual intercourse or deviate sexual intercourse;
>
> '(5) For the voluntary engaging in a fight between a man and a bull for money or other thing of value, or for any championship, or upon result of which any money or anything of value is bet or wagered, or to see which any admission fee is charged either directly or indirectly, as prohibited by law.

'(b) Any person who may use or be about to use, or who may be a party to the use of any such promises for any purpose mentioned in this Article may be made a party defendant in such suit. The Attorney General or any District or County Attorney may bring and prosecute all suits that either may deem necessary to enjoin such uses, and need not verify the petition; or any citizen of this State may sue in his own name and shall not be required to show that he is personally injured by the acts complained of."

Article 513, Vernon's Annotated Penal Code has been repealed by the 63rd Legislature and the pertinent provisions thereof are now contained in Section 43.21 of the new Texas Penal Code which was adopted by the 63rd Legislature. Sections 43.21 read as follows:

"In this subchapter:

(1) 'Obscene' means having as a whole a dominant theme that:

(A) appeals to a pruriant interest in sex, nudity, or exception;

(B) is patently offensive because it affronts contemporary community standards relating to the description or representation of sex, nudity, or excretion; and

(C) is utterly without redeeming social value.

(2) 'Material' means a book, magazine, newspaper, or other printed or writtin material: a picture, drawing, photograph, motion picture, or other material representation; a statute or other figure; a recording, transcription or mechanical, chemical, or electrical ; or other

article, equipment, or machine.

(3) 'Prurient interest' means a shameful or morbid interest in nudity, sex, or excretion that goes substantially beyond customary limits of candor in description or representation of such matters. If it appeas from the character of the material or the circumstances of its dissemination that the subject matter is designed for a s susceptible audience, the appeal of the subject matter shall be judged with reference to such audience.

(4) 'Distributed' means to transfer possession, whether with or without consideration.

(5) 'Commercially distribute' means to transfer possession for valuable consideration."

The Defendant, McCrea, states that it is his intention to seek an injunction in the state courts of the State of Texas in an effort to terminate the unlawful activities of Plaintiff in accordance with the provisions of the above quoted portions of the newly enacted Texas statutes.

XIV.

Defendants deny Plaintiff's allegations set out in paragraph 14 (a) (b) (c) (d) (e) (f) (g) (h) (i) (j) (k) (l) (m) (n) (o) (p) (q).

XV.

The Defendants say that inasmuch as Article 513, Vernon's Annotated Penal Code has now been replaced by Section 43.21 of the new Texas Penal Code that the allegations contained in paragraph 15 of Plaintiff's complaint are no longer applicable. Insofar as the remaining contentions of paragraph 15 of Plaintiff's complaint are concerned and insofar as they are relevant to the language of Section 43.21, they are denied.

XVI.

The Defendants admit only that they are sworn to enforce and prosecute all violations of existing valid laws of the State of Texas and have made statements to that effect, and in their official capacities will continue to enforce and prosecute such laws. The Defendants deny that the enforcement and prosecution of such laws as they relate to the unlawful activities of Plaintiff will deprive him of any rights, privileges or immunities secured by the Constitution of the United States.

XVII.

The Defendants deny that the Ohio Nuisance Statute spoken of in *Pursue Ltd., et al v. Lawrence S. Huffman* is in any manner, shape or form similar to Articles 4666 and 4667 of Vernon's Annotated Civil Statutes. The Defendants deny that the statute cited in the Plaintiff's original complaint are unconstitutional and void and say that they should not be enjoined in the enforcement of these laws of the State of Texas.

XVIII.

The Defendants say that Plaintiff is engaged in the unlawful activity of exhibiting "obscene material" as that term is defined in Article 513, Vernon's Annotated Penal Code and as defined in Section 43.21 of the new Texas Penal Code to become effective on January 1, 1974. Defendants anticipate that the lessor of the premises on which Plaintiff's theater is located will pursue his intentions to cancel the lease on said premises. Failing this Defendant McCrea will continue his efforts to enjoin Plaintiff from the further showing of "obscene materials" in Tom Green County, Texas.

WHEREFORE, PREMISES CONSIDERED, Defendants respectfully pray that this Honorable Court refuse and deny any and all relief sought by Plaintiff,

and that this Court find that it has not acquired jurisdiction under the statutes cited in Plaintiff's complaint; that it further find Plaintiff has not shown itself entitled to any federal relief as prayed for in the complaint.

Respectfully submitted,

JOHN L. HILL
Attorney General of Texas

LARRY F. YORK
First Assistant

JOE B. DIBRELL
Assistant Attorney General

MAX P. FLUSCHE, JR.
Assistant Attorney General

Attorneys for Defendants

P.O. Box 12548, Capitol Station
Austin, Texas 78711

CERTIFICATE OF SERVICE

I, Max P. Flusche, Jr., Assistant Attorney General of Texas, Attorney for Defendants, do hereby certify that a copy of the above and foregoing Defendants' Joint Original Answer has been deposited in the United States Mail, postage prepaid, certified on this the 21st day of December, 1973 to the following address: Frierson M. Graves, Jr., Heiskell, Donelson, Adams, Williams & Wall, 2020 First National Bank Bldg., Memphis, Tennessee 38103.

MAX P. FLUSCHE, JR.
Assistant Attorney General

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
SAN ANGELO DIVISION

KING ARTS THEATRE, INC.,	)(	
	)(	
Plaintiff	)(	
	)(	
V.	)(	CIVIL ACTION
	)(	NO. 6-345
GEORGE E. McCREA, et al,	)(	
	)(	
Defendants.	)(	

AMENDMENT TO COMPLAINT

Comes now the plaintiff and amends the Complaint by adding before the prayer the following paragraphs and the addition to the prayer as follows:

19. Plaintiff avers that effective January 1, 1974, Article 4667 of the Revised Civil Statutes of Texas will be amended in pertinent part as follows:

> "(a) The habitual use, actual, threatened or contemplated, of any premises, place or building or part thereof, for any of the following uses shall constitute a public nuisance and shall be enjoined at the suit of either the State or any citizen thereof:
>
> "(3) For the commercial manufacturing, commercial distribution, or commercial exhibition of obscene material;"

Plaintiff further avers that still in effect will be Articles 4665 and 4666 of the Texas Penal Code providing for the abatement of the nuisance as set forth in Article 4667. Plaintiff further avers that Article 513 will be repealed as well as Article 527 and that in their place and stead for the definition of obscenity will be

that definition set forth in §43.21 which in pertinent part is as follows:

> "Sec. 43.21. Definitions
>
> In this subchapter:
>
> (1) 'Obscene' means having as a whole a dominant theme that:
>
> (A) appeals to a prurient interest in sex, nudity or excretion;
>
> (B) is patently offensive because it affronts contemporary community standards relating to the description or representation of sex, nudity, or excretion; and
>
> (C) is utterly without redeeming social value."

20. Plaintiff avers that irreparable harm and injury will result if as set forth in the answer of defendants the defendants attempt to enjoin the use by the plaintiff or its motion picture theater as a public nuisance and that the enforcement of 4667 as amended using the definition of obscenity in §43.21 is unconstitutional or unconstitutional as applied on the same grounds as set forth in Paragraphs 13, 14, 15 and 16 of the original Complaint and plaintiff relies on said grounds that the amended statutes and new statutory definition is unconstitutional and void and the defendants should be enjoined and the statues declared unconstitutional.

21. Plaintiff avers that the threat of such action and the conduct of one or more of the defendants in attempting to secure a cancellation of plaintiff's lease is irreparable harm and injury requiring this Court to declare the statutes unconstitutional and void.

WHEREFORE, PREMISES CONSIDERED, plaintiff prays additionally as follows:

6. For a declaratory judgment that Texas Statute Article 4667, as amended, and Section 43.21 defining obscenity to be used in applying Article 4667, be declared unconstitutional on their face and that said nuisance statute with definitions of obscenity contained in §43.21 cannot be constitutionally applied to a motion picture theater.

7. That the Court issue a preliminary and a permanent injunction restraining and enjoining the defendants, their agents, servants and employees, from enforcing the Texas Statute, Articles 4666, 4667 as amended of the Civil Code, and Section 43.21 of the Criminal Code as effective January 1, 1974.

8. That this Court issue a temporary restraining order enjoining the defendants, their agents, servants and employees, from instituting suit or attempting to enforce the Texas statutes, Articles 4666, and 4667 of the Civil Code as amended, and to attempt to use the definition of obscenity in §43.21 to enforce said statutes alleging a nuisance against the plaintiff's operation of its theater.

Attorney for Plaintiff

OF COUNSEL:
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MR. J. MACK AUSBURN
Attorney at Law
702 San Antonio Savings Bldg.
San Antonio, Texas 78205

IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF TEXAS

KING ARTS THEATRE, INC.,	)(	No. CA 6-334
	)(	
Plaintiff,	)(	(1) District Judge:
	)(	Honorable John V.
	)(	Singleton, Jr.
	)(	
	)(	Southern District of Texas
	)(	
VS.	)(	(2) District Judge:
	)(	Honorable W.M. Taylor, Jr.
	)(	Northern District of Texas
	)(	
GEORGE E. McCREA,	)(	
County Attorney of Tom	)(	(3) Circuit Judge:
Green County, et al,	)(	Honorable Joe Ingraham
Defendants.	)(	
	)(	(4) Date of Order:
	)(	January 29, 1974

All Judges consenting, I, John R. Brown, Chief Judge of the Fifth Circuit, having been notified that the action is one required by Act of Congress to be heard and determined by a District Court of three Judges, hereby designate Circuit Judge Joe Ingraham and District Judges John V. Singleton, Jr. and W. M. Taylor, Jr. to serve as members of and to constitute the Court to hear and determine the action.

This designation and composition of the three-Judge court is not a prejudgment, express or implied, as to whether this is properly a case for a three-Judge rather than a one-Judge Court as this enables a simultaneous appeal to the Court of Appeals and to the Supreme Court without the delay, awkwardness, and administrative insufficiency of a proceeding by way of mandamus from either the Court of Appeals, the Supreme Court, or both, directed against the Chief Judge of the Circuit, the

presiding District Judge, or both. The parties will be afforded the opportunity to brief and argue all such questions before the three-Judge panel either preliminarily or on the trial on the merits, or otherwise, as that Court thinks appropriate.

JOHN R. BROWN
Chief Judge
Fifth Circuit

IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF TEXAS

SAN ANGELO DIVISION

KING ARTS THEATRE, INC.,	)(	
	)(	
Plaintiff,	)(	
	)(	
VS.	)(	CIVIL ACTION NO. 6-345
	)(	
GEORGE E. McCREA, et al.,	)(	
	)(	
Defendants.	)(	

MEMORANDUM

The above-entitled and numbered cause has been heard by this court regarding the propriety of issuing a temporary injunction against the defendants. In the meantime, upon request by this judge, and upon motion of all parties, a three-judge court has been constituted composed of Circuit Judge: Honorable Joe Ingraham; District Judge: Honorable William M. Taylor, Jr.; and District Judge: Honorable John V. Singleton, Jr.

The above cause of action has been consolidated with other cases pending before the three-judge court so constituted.

It appears to the court that it would be inappropriate for a judge, who is not a member of the panel to hear the consolidated action, to issue any further orders and therefore no injunctive relief will be granted or ordered by the undersigned judge. This order will, of course, not in any way prevent the issuance of such injunctive relief by the three-judge court panel or any member thereof if deemed appropriate and this order does not pass on or adjudicate the merits of any injunctive relief.

The Clerk will furnish a copy hereof to each attorney.

ENTERED this 4th day of February A.D. 1974.

HALBERT O. WOODWARD
United States District Judge

IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF TEXAS

JOE C. COOK, ET AL,	)(	
	)(	
Plaintiffs,	)(	
	)(	
VS.	)(	SA-74-CA-176
	)(	
EMIL PETERS, ET AL,	)(	
	)(	
Defendants.	)(	

(1) District Judge: Honorable John V. Singleton, Jr. Southern District of Texas

(2) District Judge: Honorable William M. Taylor, Jr. Northern District of Texas

(3) Circuit Judge: Honorable Joe Ingraham

(4) Date of Order: August 6, 1974

All Judges having consented, the application of the Honorable John H. Wood, Jr., the requesting Judge, for designation of a three-judge court, is to be consolidated for submission and hearing with the following cases now pending in the United States District Court for the Northern, Southern, Eastern, Western Districts of Texas:

Southern District:	No. 73-H-528
	No. 73-H-586
	No. 73-H-1114
Western District:	No. SA-73-CA-214
	No. 74-CA-78
	No. SA-74-CA-168

Northern District: No. 3-7024-C
No. 3-7437-C
No. 3-7398-D
No. CA-6-345
No. CA-4-74-45
No. CA-3-74-130

Eastern District: No. B-74-142-CA

As Chief Judge of the Fifth Circuit, I hereby designate John V. Singleton, Jr. and William M. Taylor, Jr., United States District Judges of the Southern & Northern Districts of Texas and Joe Ingraham, United States Circuit Judge, as members of and to constitute the Court to herein determine the action. Whether separate or consolidated decrees are to be entered will be left to the determination of the three-judge court.

This designation and composition of the three-judge court is not a prejudgment, express or implied, as to whether this is properly a case for a three-judge rather than a one-judge court. This matter is best determined by the three-judge court as this enables a simultaneous appeal to the Court of Appeals and to the Supreme Court without the delay, awkwardness and administrative insufficiency of a proceeding by way of mandamus from either the Court of Appeals, the Supreme Court, or both, directed against the Chief Judge of the Circuit, the presiding District Judge, or both. The parties will be afforded the opportunity to brief and argue all such questions before the three-judge panel either preliminarily or on the trial of the merits or otherwise as that Court thinks appropriate.

JOHN R. BROWN
Chief Judge
Fifth Circuit

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

UNIVERSAL AMUSEMENTS	)(	
	)(	
V.	)(	CIVIL ACTION NO.
	)(	73-H-528
CAROL VANCE, ET AL.	)(	

ORDER

A pretrial conference was held on August 12, 1974, in each of the following cases which are carried under the above style and number:

Universal Amusements v. Vance, C.A. 73-H-528 (Houston)

Hargrove v. Hill, et al., C.A. 73-H-1114 (Bryan)

Ellwest v. Walls, CA-4-74-45 (Ft. Worth)

Cinema X v. Curry & Walls, CA4-74-28 (Ft. Worth)

Southland Theatres v. Butler, SA 73-CA-214 (San Antonio)

San Antonio Book Mart v. Smith, A-74-CA-078 (Austin)

Sun Family Entertainment v. Hanna, B-74-142 CA (Beaumont)

Dexter v. Butler, SA 74-CA-168 (San Antonio)

King Arts Theatre, Inc. v. McCrea, CA-6-345 (Lubbock)

Associated Theatres v. Wade, CA 3-7347 (Dallas)

Jones v. Dyson, CA-3-7024-C (Dallas)

Associated Theatres v. Dyson, CA-3-7398-C (Dallas)

Cook v. Peters, SA 74-CA-176 (San Antonio)

Ellwest v. Byrd, CA 3-74-130 (Dallas)

In *Dexter v. Butler*, SA 74-CA-168, *King Arts Theatres v. McCrea*, CA 6-345, and *Ellwest v. Byrd*, CA3-74-130, it is hereby ordered:

That on or before September 6, 1974, at 5:00 p.m., the parties in each case will file an agreed pretrial order, the form of which the court designated at the conference.

That on or before October 4, 1974, at 5:00 p.m., the parties in each case will file briefs concerning the legal issues presented in each case.

In the rest of the above-styled-and-numbered cases a temporary injunction has been or will be entered pending the final disposition of these cases by a three-judge federal court.

DONE at Houston, Texas, on this the 20th day of August, 1974.

_____

United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

UNIVERSAL AMUSEMENT COMPANY, INC., et al.,	)(	NO. CA-73-H-528
V.	)(	
CARROLL VANCE, et al.,	)(	
KING ARTS THEATRE, INC.	)(	
V.	)(	NO. CA-6-345 (Lubbock)
GEORGE E. McCREA, et al.	)(	

PRE-TRIAL ORDER

This pre-trial order is the result of the pre-trial conference of August 12, 1974, by which this cause of *King Arts Theatre, Inc. v. George E. McCrea, et al.* was on of three selected for issues to be presented before a consolidated hearing of a three-judge district court.

APPEARANCE OF COUNSEL

1. King Arts Theatre, Inc.

   Frierson M. Graves, Jr.
   2020 First National Bank Bldg.
   Memphis, TN 38103 901/525-8231

2. George E. McCrea, et al.

   Max P. Flushe, Jr.
   Assistant Attorney General
   P.O. Box 12548, Capitol Station
   Austin, Texas 78711 512/475-3281

STATEMENT OF THE CASE

In October, 1973, the King Arts Theatre, Inc. was

operating a motion picture theater for adults only in an enclosed theater in San Angelo, Texas, showing sexually explicit films which it believed to be commercially acceptable. On October 30, 1973, as shown by Exhibit A to the complaint, a notice was received from the landlord terminating the lease of the property as of November 15, 1973, and conveying information that the defendant George E. McCrea, the County Attorney, had contacted the landlord stating he intended to bring an application for an injunction as a nuisance to prohibit the future showing of allegedly pornographic pictures displayed at the theater. This suit was filed by the plaintiff on approximately November 12, 1973, requesting declaratory judgment and injunctive relief as set forth in the contested issues of law. The defendants answered the lawsuit and a hearing was held in which defendants admitted that the landlord had been contacted and further admitted that the County Attorney intended to bring such nuisance action. The answer further stated that the County Attorney intends to seek an injunction based on nuisance in the state courts in an effort to terminate what he considers unlawful activities of the plaintiff in showing obscene material in the theater located in Tom Green County. The answer stated and it was repeated at the time of the hearing of this cause that the previous statute had been repealed and that the new nuisance statute and obscenity statute was in effect. The defendant County Attorney had relied upon the old nuisance statute and now intended to rely upon the new nuisance and obscenity statutes to pursue his intentions to cancel the lease on the premises and would continue his efforts to enjoin the theater from showing of allegedly obscene materials in the theater by the use of said statutes.

JURISDICTIONS

The parties agree that the Court has full and complete jurisdiction of the subject matter and the parties.

MOTIONS

The only pending motion is the motion for preliminary injunction which would be disposed of by the hearing before the Court.

CONTENTIONS OF THE PARTIES

Plaintiff

The plaintiff, as the operator of a motion picture theater in San Angelo admitting persons over 18 only and showing "adult only" films which are sexually explicit, contends that the showing of unnamed motion picture films in the future cannot be enjoined as a nuisance.

It contends that each motion picture must be judged upon its own merits and upon exhibition any proper law may be used to punish exhibition.

It contends that the use of a nuisance statute to stop the showing of unnamed films in the future is not proper and is a prior restraint.

Any injunction would be improper if it enjoined the showing of any film as "obscene" because the injunction would be too vague and indefinite. It would further be an improper prior restraint to enjoin motion pictures which contained any named conduct such as sexual intercourse since sexual intercourse is not of itself obscene but must still meet the test of appealing to the prurient interests, patently offensive as affronting contemporary community standards and utterly without redeeming social value.

The plaintiff further contends that the fact that it showed sexually explicit films in the past cannot be the grounds for the maintenance of a nuisance action which would abate the use of the property as a motion picture theater showing adult films in the future for a period of one year as provided under the nuisance statute, Article 4666.

The plaintiff contends that the use of the nuisance statute, Articel 4666 and 4667, as originally passed and as amended, is an unconstitutional application of the law. The plaintiff further contends that under the new amended nuisance statute, Article 4667 the District Attorney or County Attorney can still bring a nuisance action to enjoin such commercial exhibition of obscene material which is unconstitutional or an unconstitutional application of the law.

The plaintiff contends that "obscene" is now defined under the new Texas Statute, Section 43.21 and that such statute is unconstitutional on its face and as applied in that the statute fails to specifically define by applicable state law as written or authoritatively construed the sexual conduct which is prohibited. It is therefore vague and indefinite and it fails to give adequate fair notice.

Defendant

The defendant contends that the plaintiff for a long period of time has been showing sexually explicit motion pictures which are obscene to adults as defined by Texas law as written or as authoritatively construed.

The defendant contends that on the basis of the past conduct of showing such sexually explicit movies which are obscene and the indication that such conduct will continue indefinitely in the future a nuisance exists under applicable Texas law.

The defendant contends that under Article 4666 and Article 4667 prior to amendment January 1, 1974, that the theaters constituted a disorderly house as defined in Article 513 so as to authorize the County Attorney to bring a suit for a nuisance to enjoin the showing of future obscene movies or movies containing such sexually explicit conduct which in and of itself is hardcore pornography as defined by applicable law.

The defendant further contends that Article 4667 as amended now specifically provides that a nuisance may be abated by the habitual use, actual, threatened or contemplated for the commercial exhibition of obscene materials.

The defendant contends that the motion picture theater here involved is a public nuisance as contemplated by the statutes and the the material shown is obscene as defined by the new Texas statute, Section 43.21.

The defendant contends that the obscenity statute and more particularly the definition thereof in Section 43.21 is constitutional on its face and as applied. While sexual conduct is not specifically spelled out in the statute, the statute as authoritatively construed heretofore by the Texas courts is constitutional and the plaintiff has fair notice of what is prohibited by said statute.

The defendant contends that the nuisance statutes may be applied as provided in the statute.

ADMISSIONS OF FACT

The parties stipulate and admit as follows:

1. The theater was operating.

2. There was an attempted cancellation of the lease a the suggestion of the County Attorney.

3. The County Attorney intended to enforce the law by bringing a nuisance action under Section 4666 and 4667 of Vernon's Annotated Civil Statutes but because of the Federal Court action and the request for an injunction and setting of the hearing did not bring such action but withheld action until the Court ruled.

4. On January 1, 1974, an amended Article 4667 became effective and Article 513 of Vernon's Annotated Penal Code which provided a definition of obscenity was

also repealed. Substituted in place thereof was the definition contained in Section 43.21 of the new Texas Penal Code.

5. Defendant County Attorney intends to continue to rely upon Articles 4666 and 4667 as amended and the definition of obscene material as now defined in Section 43.21 of the new Texas Penal Code and to pursue his intention to cancel the lease and enjoin as a nuisance the plaintiffs from the further showing of "obscene materials" in said theater unless restrained by this Court.

CONTESTED ISSUES OF FACT

There are no contested issues of fact. The issue is one of Law to determine if the nuisance and obscenity statutes are constitutional or if they may be applied constitutionally to a motion picture theater. Whether the films are or are not obscene is not necessary for a determination of this cause.

CONTESTED ISSUES OF LAW

1. Is the nuisance statute, Article 4666, unconstitutional on its face or can it be constitutionally applied to an enclosed motion picture theater? It is challenged on the following grounds:

A. The nuisance statute operates as a prior restraint in that upon abatement of a nuisance the property is closed for one year from the date of judgment.

B. It is a prior restraint upon matters not already published and not yet found to be obscene.

C. Evidence of general reputation is admissible to prove the existence of a nuisance.

D. It is a deprivation of property without due process by requiring a bond of from one to five thousand dollars conditioned that the prohibited act shall not be

permitted to be done to reopen the property.

E. Violation of the bond could be by contempt putting the burden on the operator to determine any violation of the order and is a denial of due process of law and an unconstitutional prior restraint.

F. Proof of past repeated showing of obscene movies is not proof that another expression or a motion picture is and of itself obscene.

2. Is the nuisance statute, Article 4667, prior to January 1, 1974, unconstitutional on face or as applied to a motion picture theater? The statute is challenged for the following reasons:

A. A motion picture theater is not a bawdy or disorderly house and said statute cannot be constitutionally applied to a theater as a nuisance.

B. The enjoining of a theater as a nuisance is a prior restraint and no motion picture can be suppressed, prohibited or restrained before it is published or exhibited or in any manner communicated.

C. You cannot enjoin the future publication or exhibition of expression.

D. The statute does not provide procedural safeguards necessary to insure due process of law under the First and Fourteenth Amendments as follows:

(1) There is no provision for notice prior to the issuance of the temporary injunction.

(2) There is no provision for a prompt hearing.

(3) There is no provision for a prompt judicial determination.

(4) There is no provision for a prompt appellate review.

(5) The burden of proof is upon the motion picture theater operator.

(6) There is a heavy presumption against constitutional validity and due process requires strict standards describing the standards for a judicial determination of First Amendment rights.

(7) Any injunction against future motion picture films by prohibiting the showing of "obscene" films is too vague and indefinite.

(8) Any injunction against showing films containing certain specified conduct is invalid in that the conduct is not prohibited per se but it still must appeal to the prurient interests, be patently offensive and without any redeeming social value which requires a judicial determination in each case on the merits.

3. Is Article 513 defining disorderly house (Article 4667 defined as a nuisance a disorderly house as defined under Article 513) constitutional or unconstitutional on its face, or as applied to a motion picture theater? It is challenged on the following ground:

A. The definition of obscene is vague and indefinite in that it fails to specifically define by applicable state law as written or authoritatively construed the sexual conduct which is prohibited.

4. Is the nuisance statute, Article 4667, as amended, unconstitutional on its face or as applied to a motion picture theater? It is challenged as follows:

A. For the same reasons as the prior Article 4667.

B. It is unconstitutional on its face because nuisance may not be applied to the exhibition of material presumed protected under the First Amendment.

C. The enjoining of "obscene material" under the statute for its habitual use, threatened or contemplated,

is too vague and indefinite and is a prior restraint. The statute does not permit the injunction against a continued showing of one particular film but requires the closing of the theater for one year as required by the statute because of such use.

D. The statute does not permit an injunction against showing films with certain sexual or obscene conduct. If the nuisance is found, the statute requires the closing of the theater for one year under 4666 as a related statute and is a prior restraint.

5. Is Section 43.21 of Vernon's Texas Penal Code defining obscenity unconstitutional on its face or as applied? It is challenged on the following grounds:

A. The definition of obscenity is too vague and indefinite.

B. The statute as written or as authoritatively construed is unconstitutional because it does not specifically define the sexual conduct prohibited and does not provide fair notice.

C. The statute is overbroad.

APPROVAL RECOMMENDED:

_____ _____

Attorney for Plaintiff Attorney for Defendants

APPROVED this __ day of _____, 1974.

_____

UNITED STATES
DISTRICT JUDGE